UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 3

CAYUGA MEDICAL CENTER
AT ITHACA, INC.

and **Cases 03-CA-156375**
03-CA-159354
03-CA-162848
03-CA-165167
03-CA-167194

1199 SEIU UNITED HEALTHCARE WORKERS EAST

GENERAL COUNSEL'S BRIEF TO THE ADMINISTRATIVE LAW JUDGE

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I. STATEMENT OF THE CASE

This matter was heard before Administrative Law Judge David I. Goldman (ALJ) from May 2-6 and 23, 2016. An Order Consolidating Cases, Consolidated Complaint and Notice of Hearing (Complaint) in Cases 03-CA-156375, 03-CA-159354, 03-CA-162848, 03-CA-165167, and 03-CA-167194 issued on February 26, 2016. (GC Ex. 1(m)).[1]

The Complaint, as amended orally at hearing, alleges that Cayuga Medical Center at Ithaca, Inc. (Respondent) violated Section 8(a)(1) and (3) of the Act by maintaining numerous unlawful rules and policies, interrogating and threatening employees because of their union activity in support of 1199 SEIU United Healthcare Workers East (Union), and disciplining employees for violating unlawful work rules, protected concerted activities, and union activities.

Respondent, in its Answer, admits that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and has been a healthcare institution within the meaning of Section 2(14) of the Act. (GC Ex. 1(o)). Respondent further admits that the Union is a labor organization within the meaning of Section 2(5) of the Act. (GC Ex. 1(o)).

Respondent admits that the following individuals held the positions set forth below and have been supervisors of Respondent within the meaning of Section 2(11) of the Act and agents of Respondent within the meaning of Section 2(13) of the Act: Alan Pedersen, Vice President of Human Resources; Linda Crumb, Assistant Vice President for Patient Services; Amy Mathews, Director of Emergency Department; Florence Ogundele, House Supervisor; Kansas Underwood, Director Medical/Telemetry; Sean Newvine, Director ICCU; Norman Joel Brown, Interim

[1] Throughout this brief the following references will be used: GC Ex. ___ for General Counsel's exhibit; R. ___ for Respondent's exhibit; Tr. ___ for transcript page(s); and Supp. Tr. ____ for supplemental transcript page(s).

Director ICCU; Sandra Beasley, Interim Director ICCU; and Gloria Prince, Interim Director ICCU.

Respondent also admits that it maintained a Nursing Code of Conduct with the following rules:

Clinical Excellence

1. Respects confidentiality and privacy at all times, including co-workers, adhering to the Social Networking Policy.

Customer Service

2. Interacts with others in a considerate, patient and courteous manner.

3. Is honest, truthful, and respectful at all times.

People

4. Utilizes proper channels to express dissatisfaction with policies and administrative or supervisory actions and without fear of retaliation.

Community

Inappropriate and disruptive communications/behaviors include but are not limited to:

5. Displays behavior that would be considered by others to be intimidating, disrespectful or dismissive.

6. Criticizes co-workers or other staff in the presence of others in the workplace or in the presence of patients.

(GC Ex. 3).

Respondent further admits the following Complaint allegations:

- about October 5, 2015 Respondent, by Amy Mathews, issued a verbal warning to employee Scott Marsland.
- about June 26, 2015, Respondent suspended its employee Anne Marshall.
- about July 10, 2015, Respondent issued a verbal warning to Anne Marshall.
- about August 31, 2015, Respondent demoted employee Anne Marshall.
- about October 30, 2015, Respondent issued employee Anne Marshall a performance evaluation.

(GC Ex. 1(o)).

Respondent denies that it violated Section 8(a)(1) and (3) of the Act, by engaging in any of the conduct alleged in the Complaint. Specifically, Respondent denies that Alan Pedersen issued a notice to employees about May 7 and since maintained the following rule "if you feel you are being harassed or intimidated feel free to contact your supervisor, director, or security." Respondent denies that Alan Pedersen about July 8 informed employees that they needed to cease distributing union literature and leave immediately while permitting employees to distribute other literature. Respondent denies Pedersen about August 26 issuing a notice to employees and since maintaining the following rule: "if you feel that you continue to be harassed you have the right to file a complaint in our incident reporting system and notify your Director so that we can address the behavior with the individual involved." Respondent denies that Alan Pedersen informed employees that it was inappropriate to discuss their salaries and/or wages and to refrain from doing so.

Respondent further denies that Norman Joel Brown about May 8 interrogated its employees about union membership, activities, and sympathies. Respondent denies that about May 8 threatened its employees with unspecified reprisals unless union activities ceased. Respondent denies prohibiting employees from distributing and posting union literature around the facility while permitted employees to post other literature from May through July. Respondent denies that Linda Crumb about August 31, informed employees during a disciplinary meeting that the contents of the meeting were to be kept confidential. Respondent denies about September 24 that employee Scott Marsland engaged in concerted activities with other employees for the purposes of mutual aid and protection, by concertedly complaining about the lack of clinically competent coverage during breaks. Respondent denies disciplining Marsland for violating the following rule, "Criticizes co-workers or other staff in the presence of others in the workplace or in the presence of patients" and to discourage employees from engaging in these or other concerted activities.

Respondent denies that about November 10 Florence Ogundele, on her Facebook page, threatened employees with various forms of unspecified reprisals, including unemployment, because of their protected, concerted or union activities.

Respondent denies disciplining Marshall for violating the following rules 2, 3, and 5 listed above, to discourage employees from engaging in concerted activities, and to discourage employees from engaging in union activities. Respondent denies it interfered with Section 7 of the Act in violation of 8(a)(1) and (3) of the Act.

II. FACTS

A. Background

Respondent, a community hospital in Ithaca, New York, employs around 1,350 people, about 350 of which are registered nurses. (Tr. 33). In May 2015, the nurses began a campaign to organize the facility.[2] The lead union activists are Intensive Care Unit (ICU) nurse Anne Marshall, and Emergency Department (ED) nurse Scott Marsland.

The ICU is responsible for the sickest patients in the hospital. Respondent's ICU has 16 beds and three to six nurses per shift. (Tr. 144, 441). Full-time ICU nurses work three 12-hour shifts per week. (Tr. 146). The nurses describe the ICU as chronically understaffed. (Tr. 146, 443). In total there are less than 25 nurses in the ICU. (Tr. 144). Patient census is the number of patients that are currently on the unit, while patient acuity is the level of intensity of work and time needed to care for a particular patient. (Tr. 145). When the ICU is understaffed the nurses are continually called and asked to work more than their normal schedule. (Tr. 146). Likewise, ICU nurses may not get breaks and lunches because of low staffing levels. (Tr. 144).

ICU nurses report to the unit director. When the ICU's permanent director, Sean Newvine, left, he was replaced with a number of interim directors. The director or the interim director is ultimately responsible for staffing on the unit. The nurses self-staff by filling in six slots per shift about a month in advance, but the director approves the final schedule for turn out. (Tr. 154, 443). All six slots are never filled when the schedule is approved. (Tr. 15, 444). The ICU also has charge nurses and team leaders. Charge nurses are responsible for daily operations in the unit, which includes: making nurse to patient assignments, overseeing admissions and

[2] All dates herein are 2015 unless otherwise noted.

discharges, bed census, two bed meetings, and report to other emergencies throughout the hospital. (Tr. 142). Similarly, team leaders are responsible for patient flow into and out of the ICU as well as going to bed meetings. Team leaders also have responsibility for the quality assurance incident reporting system and the Kronos payroll system. (Tr. 142). The role of team leader changed depending on the director responsible for the unit. (Tr. 441). As Marshall and Monacelli explained, there is currently no job description for the team leader role, and the nurses "made it up as they went along." (Tr. 143, 438-40).

The Emergency Department (ED) has 24 beds across 19 rooms which each have their own purpose. (Tr. 488). Rooms 1-2 comprise "Fast Track," which is the portion of the department where the lowest acuity patients are sent. (Tr. 461, 488-90). The highest acuity[3] patients are placed in beds 11-15, which is where Scott Marsland typically worked. (Tr. 469, 489). The ED has approximately 30 nurses on staff, most of which work 12hour shifts. (Tr. 462, 490, 492). Similar to the ICU, the ED nurses complain of understaffing. Marsland described the discussion amongst his colleagues about the inability to take breaks as "part of the air we breathe in at Cayuga Medical Center." (Tr. 502). Specifically, on a weekly basis the nurses would discuss whether or not specific nurses were clinically capable of covering breaks. (Tr. 504-05, 530). Marsland even filed a charge with the Department of Labor (DOL) alleging that ED nurses were unable to take their breaks. (Tr. 466). ED nurses report to Amy Mathew, the emergency department director and an admitted supervisor . (Tr. 461, 490). Unit Manager Kevin Harris [4] is

[3] Acuity in the emergency setting are patients that need immediate intervention to be stabilized. (Tr. 489).

[4] There is only one unit manager in the emergency department and he/she reports to the director. (Tr. 560).

also an admitted supervisor. (Tr. 9). Both Harris and Mathews were aware of employee concerns about the lack of clinically competent personnel to cover employee breaks. (Tr. 530, 576).

B. Respondent's Response to Union Campaign

1. Respondent's Conduct and Work Rules that Chill Employee Organizing Activities

In May once the Union campaign began, the hospital responded by issuing emails to all 350 members of the nursing staff. (Tr. 37-38). Alan Pedersen, Vice President of Human Resources, was the spokesperson for Respondent throughout the union campaign process. (Tr. 792). In total, ten emails were sent out. (Tr. 37, GC Ex. 2). The first email issued to employees was on May 7. (Tr. 41, GC Ex. 2a). This email tells employees, "[i]f you feel you are being harassed or intimidated feel free to contact your supervisor, director, or security." (GC Ex. 2a). On August 26, Pedersen sent an email containing a similar sentiment. It reads in relevant part, "If you feel that you continue to be harassed you have every right to file a complaint in our incident reporting system, and notify your Director so that we can address the behavior with the individual involved." (GC Ex. 2f). In early May, Pedersen held a meeting for the department leaders where he told the directors to distribute a fact list about the union to each employee in a one-on-one meeting. (Tr. 1040-42, GC Ex. 39, 47). Pedersen also told senior leadership to hand-deliver the May 7 email in the individual nurse meetings. (Tr. 1040-42, GC Ex. 39, 40, 47).

2. Interrogations

At Pedersen's direction, Norman Joel Brown set up individual meetings in his office with the nurses in the Spring of 2015. (Tr. 193, 428, 1042). Marshall was uncomfortable approaching Brown alone, so she requested that a colleague attend with her. (Tr. 193). Brown told Marshall "absolutely not" and that he would meet with them one at a time. (Tr. 193). Marshall met with Brown first. (Tr. 193). According to Marshall, Brown told her that he knew she was the

ringleader, that he knew she was the one promoting all the union stuff, and that if it did not stop he was going to get Human Resources involved. (Tr. 193, 286).Brown also interrogated another ICU nurse, Terrie Ellis, about her union activity. (Tr. 428). At the hearing, Ellis testified that during her one-on-one meeting with Brown, Brown asked her if she knew about the union campaign, if she had been approached about it at work, and if she had felt pressured or bullied about it in any way. (Tr. 428). Brown denied asking Ellis any questions during her one-on-one meeting. (Tr. 1044). In fact, Brown claims he never asked anyone any questions during his one-on-one meetings with the ICU nurses. (Tr. 1003, 1005). Brown also told Ellis that Respondent's hands would be tied if the union was brought in. (Tr. 435). Brown told Ellis that the hospital had to be very careful about looking like they were trying to keep the union out. (Tr. 435). At the end of the meeting, he asked Ellis not to discuss the meeting with the other people she worked with because he wanted to address it with them himself while they remained "unbiased." (Tr. 429).

Brown testified that he told nurses during these individual meetings that no one could poke them in the chest and force them to sign cards. (Tr. 1045). He also told them that union supporters could not talk to them on the clock. (Tr. 1045). He also told nurses that if the union made the hospital a closed shop they would have no choice but to join the union. (Tr. 1045). No one ever told Brown during these meetings that they felt intimidated by the union supporters. (Tr. 1045).

3. Ceased Distribution and Posting of Union Literature

Throughout the campaign union supporters hung union literature throughout the hospital and placed literature in employee break rooms. Respondent admitted that employees can post material. (Tr. 173, 818). At Pedersen's direction Alisa Zelsnak removes flyers around the hospital once a week on Fridays, and the evidence demonstrates that the union materials were

taken down at a far greater rate than once a week on Fridays. Brown had been taking down posted union literature since May and Pedersen admits that he knew as much. (Tr. 59, 818, GC Ex. 44). Crumb took the stance that "they have the right to put up and we have the right to take down." (GC Ex. 24). This includes taking away non-posted union material. (GC Ex. 24). Crumb went even further by sending the following email to senior management "When you make your rounds please remove Union material at time clocks and break rooms or anywhere else you find them. Security has been instructed to do the same. They have the right to put up and we have the right to take down." (GC Ex. 22).

At the hearing, Brown admitted that he took down pro-union postings, sometimes four times a day. (Tr. 1007, 1035). He also admitted that he had staff members bring the posters to him. (Tr. 1007). Though he later testified that he did not have staff members take down union flyers and bring them to him, his affidavit also reads "I had my department team take the flyers down that were posted in the department and give them to me." (Tr. 1036).

Additionally, Marshall testified that in June or July she hung a flyer on the bulletin board. (Tr. 164). Marshall then observed Brown walk past her toward the bulletin board. (Tr. 164). As he walked out of door she walked back in and her flyer was gone. (Tr. 164). There was no one else in the hallway during this interaction. (Tr. 164). Marshall testified that there was non-hospital material posted on the bulletin boards which were not taken down when the union flyers were removed. (Tr. 164; GC Ex. 16, 17, 18).

Respondent continues to remove union literature throughout the hospital. Four days before the hearing Marshall had posted a Union flyer on the bulletin outside of ICU by the time clock and elevator. (Tr. 416). Marshall was heading downstairs to get coffee and witnessed Jackie Barr, patient relations administrator, take down the flyer. (Tr. 417). Marshall told Barr she

was not permitted to take the flyer down. (Tr. 417). Barr told Marshall the bulletin board was only for hospital sponsored events. (Tr. 417). Marshall told Barr that salsa dancing was not a hospital sponsored event. (Tr. 417). Barr then took the salsa dancing poster and the Jehovah's Witness card off the board. (Tr. 417).

Only three days before the hearing Patricia Furentino, the new ICU director, went to the break room and took one of Marshall's union flyers off the board and put it into the recycling bin. (Tr. 417). Marshall took it out of the recycling bin and brought it to Furentino, informing her that she could not take the flyers down. (Tr. 417).

Similarly, Marshall testified that she would put material on the break room table continually on the shifts she worked. (Tr. 184). There were non-union materials put on the tables in the break room by her colleagues. (Tr. 185, GC Ex. 20). For example, Marshall observed Girl Scout cookie sales, parties, Pampered Chef sales, kids' school fundraisers, wrapping paper, candy sales, and Avon. (Tr. 185, GC Ex. 20). Marshall recalled one particular sale form being left for two weeks before being removed (Tr. 187, GC Ex. 20). Respondent admits that employees can leave materials in break rooms. (Tr. 188). However, Marshall would sometimes have to replace the flyers a few times a day. (Tr. 184). Brown admits that he would take union materials off of the break room table. (Tr. 1035).

4. Cafeteria Tabling

In July, the union organizers began to set up tables in the cafeteria to distribute literature and talk about unionization with hospital staff. Pedersen admitted approaching Marshall with the CEO and the Vice President of Public Relations while she was sitting at a table in the cafeteria displaying union literature. (Tr. 60). Pedersen admitted telling Marshall that "she really should not be doing that here." (Tr. 60, 802). Pedersen also admits to telling Marshall that she should

not be sitting in the cafeteria with her materials. (Tr. 60, 802). Marshall testified that Pedersen approached her and said that she was not allowed to be in there with her information and that she had to leave. (Tr. 191, 276, 277). Pedersen further admitted that after he spoke to Marshall she gathered her materials and left. (Tr. 61, 802). Marshall testified she was intimidated by the three members of senior management standing over her, so she packed her items and left. (Tr. 191).

Within a day or two of the initial incident, Pedersen admitted to having a similar interaction with organizers Scott Marsland and Erin Bell. (Tr. 61, 803, GC Ex. 43). Marsland testified that in July he went to the cafeteria during lunch to table with Erin Bell. (Tr. 497). During this interaction, Pedersen admits to having told Scott and Erin that "they should not be doing that here." (Tr. 61). However, he denies having told the organizers that he was going to call security to take away the materials. (Tr. 62). This is belied by the video evidence which demonstrates he said exactly that. (GC Ex. 33, 43).

After these two interactions in the cafeteria, Pedersen claims that the hospital permitted the union organizers to sit at tables in the cafeteria with their materials undisturbed. (Tr. 63). However, no one ever affirmatively informed employees they were permitted to continue to table in the cafeteria, a fact which Pedersen admits. (Tr. 66, 281, 418).

5. Supervisor's Threatening Facebook Posts and Animus

House supervisor, Florence Ogundele, has a public Facebook account with over 100 friends, over 20 of which are Respondent's employees. (Tr. 74-75). On about November 10, Anne Marshall testified at a New York State Division of Human Rights (NYSDHR) hearing on behalf of her colleagues against her supervisor, Joel Brown, for sexual harassment. (Tr. 513). Scott Marsland, whose Facebook name is Charlie Green, posted on Facebook in support of Marshall. (Tr. 512-13, GC Ex. 7). Ogundele saw Marsland's post and responded to it. (Tr. 76,

GC Ex. 8). According to Marshall, who is friends with Ogundele and Marsland on Facebook, the posts were made the day of her NYSDHR hearing and the day following. (Tr. 196). Ogundele admitted to posting all three statuses to Facebook. (Tr. 734, GC Ex. 8-10).

Ogundele testified that her responses were specifically related to the union and the way it impacts employees who do not support the union. (Tr. 726-27). In her post, Ogundele told Marsland that she could go from "nice to bitch in 20 second flat," that if he wanted to fight her she would do it face-to-face, not to mess with her, and to tell his disciples to do the same. (Tr. 77, GC Ex 8). Ogundele further admitted that disciples meant the other people involved in the union campaign. (Tr. 77). Ogundele further admitted that she took the first post down out of respect for her boss, Linda Crumb, who issued her a verbal warning a day or two after she made the first post. (Tr. 82, 728; R. Ex. 4). However, Ogundele received the verbal warning on November 18, over a week after the NYSDHR hearing, and that is when she took the post down. (Tr. 735, 739, 747). Crumb claims she called Ogundele and told her to take the first posting down prior to disciplining her for the post. (Tr. 941). Ogundele testified inconsistently about whether or not she was called prior to the meeting on November 18. (Tr. 736-37). Crumb asserts that she has only seen the first post. (Tr. 972-73).

In the second post, Ogundele said "To my fellow CMC who is tired of all the bullshit going on at work and the people supporting them this is what I want to say[.] I want you to look at the people who are sending you e mail, [sic] sending letters to you [sic] home and calling you to joined [sic] their cause after you told them to leave you alone. I want you to take a good look at them, you will see that if you follow any one of them it will lead you to unemployment, these people have nothing to lose. Now the only thing that make [sic] them relevant is bullying, intimidating and down right [sic] mean." (GC Ex. 9). In her third post, Ogundele said "now that

the ass hole [sic] mentioned my name, I will show him and all his followers that I am not the one to mess with I have nothing to lose," and "They pick the wrong person to pissed [sic] off. I will like anyone of them to confront me instead of gossiping. I saw them when I walked into the ICU today and don't have the guts to face me. Hell this shit is on and am tired of playing nice." (GC Ex. 10).

Also in November, at Amy Mathews direction, Ogundele held a mid-shift safety huddle in the ED. (Tr. 72, 493, 533-34, 740). A safety huddle at this time is highly unusual and reserved for extreme traumas, special dangerous circumstances, or mass casualty events. (Tr. 494, 533). According to Cheryl Durkee, another ED nurse, Ogundele said that if people did not want to join the union there was no right to bully anyone. (Tr. 534). Durkee said that it goes both ways and no one should be bullying her either because she is pro-union. (Tr. 534). Ogundele admitted to telling employees at this meeting that she wanted them to stop discussing the union at work. (Tr. 73). Ogundele further admitted that employees can talk about personal matters at work. (Tr. 70).

C. Discipline Policies

Linda Crumb, Vice President of Patient Services, described Respondent's disciplinary action as a "progressive process" where "usually there's a verbal warning that can be presented in writing as a verbal warning; then a written warning; then suspension – and that can be various lengths of time – and then termination." (Tr. 913). These disciplines are based, in part, on the guidance from the code of conduct.

1. Code of Conduct

To regulate nurse behavior, the hospital adopted and maintains a nursing code of conduct which is available for employees to view electronically on Respondent's intranet. (Tr. 43, 69,

955; GC Ex. 3). The code of conduct is laminated and posted throughout the facility and is given to nurses during disciplinary meetings. (Tr. 148).

There are six code of conduct rules at issue. One rule under "Clinical Excellence" reads "[r]espects confidentiality and privacy at all times, including co-workers, adhering to the Social Networking Policy." The two rules under "Customer Service" read "[i]nteracts with others in a considerate, patient and courteous manner" and "Is honest, truthful, and respectful at all times." Under "People" one rule reads "Utilizes proper channels to express dissatisfaction with policies and administrative or supervisory actions and without fear of retaliation." Finally, two of the rules under "Community" read "Displays behavior that would be considered by others to be intimidating, disrespectful or dismissive" and "Criticizes co-workers or other staff in the presence of others in the workplace or in the presence of patients."

2. Wages

Marshall testified that it has always been Respondent's general policy that employees are not permitted to discuss their wages. (Tr. 183, 382). (Tr. 804). Specifically, Marshall testified that her former director, Sean Newvine, told her that such discussions were not permitted. (Tr. 184, 383-84). Marshall had also posted an article from the Ithaca Journal detailing the median range of salaries for nurses in the area based on years of experience. (Tr. 179-80; GC Ex. 19). Several nurses wrote their years of experience and corresponding salaries on the article. (Tr. 180; GC Ex. 19). Brown took down the article a few days later. (Tr. 180, 386).

Marshall further testified that more recently, Alan Pedersen told a group of five nurses that it was inappropriate to discuss their wages at work. (Tr. 184, 381). Specifically, in the fall of 2015, Marshall and four other nurses were standing at the nurses' station discussing what some of the new nurses who were being hired were making and what they were making based on

experience when Pedersen made his comment. (Tr. 184, 381). While he denied personally telling employees not to discuss salary information, Pedersen admitted that it is a generally accepted practice that employees are not to discuss salary information and that the hospital encourages individuals not to discuss their salaries or pay rates with one another. (Tr. 48, 804). He also admitted that letters have gone out to the staff which asked them to keep the contents of their salary information confidential. (Tr.49; GC Ex. 5, 6).

3. Confidential Disciplinary Meetings

During a disciplinary meeting, Respondent told Marshall and social worker, Kim Paquin, to keep the contents of the disciplinary meeting confidential. Pedersen admitted that contents of disciplinary meetings should be kept confidential. (Tr. 50). Pedersen admitted that Linda Crumb told him that she told Anne Marshall and Kim Paquin during Marshall's disciplinary meeting that the contents should be kept confidential. (Tr. 50, 51). Moreover, the same was relayed in a position statement from Respondent's counsel, "With respect to the August 31, 2015 meeting that Ms. Paquin witnessed at Ms. Marshall's request, Ms. Crumb asked that the conversation remain confidential because CMH considers individual personnel actions to be private matters." (Tr. 811). Crumb claims that her statement of confidentiality was directed at Pacquin, but the recording reveals Beasley as the person making the statement. (Tr. 387, 931; GC Ex. 26(a), 26(b)). Furthermore, Marshall testified that the statement was not directed specifically at Pacquin. (Tr. 50-51).

D. Respondent's Disciplines of Anne Marshall

Marshall began working for Respondent in 2007 as an RN in the ICU. (Tr. 141). In 2011, Marshall became a charge nurse, and in 2013 she became a team leader. (Tr. 142). In May 2015, Marshall began campaigning for the union. It is no secret that Marshall is one of the lead union

organizers at the hospital. In fact, Ogundele, Pedersen, Brown, and Crumb all admit that Marshall is an active organizer. (Tr. 37, 71, 1037). Her colleagues Cheryl Durkee and Christine Monacelli, and even her former supervisor Brown, described Marshall as the most active ICU nurse in the organizing campaign. (Tr. 452). Hospital management knew that the active organizers had been calling employees to talk about the campaign, sending out emails, and sending letters to employees' homes. (Tr. 71). Respondent stipulated that Marshall was an organizer from early on in the campaign. (Tr. 161). Brown admitted that he knew Marshall was the one posting flyers, leaving materials in the break room, and speaking to her colleagues about the union. (Tr. 1038-39).

Between June and October 2015, Anne Marshall received four negative marks in her employee file. A month prior to her first discipline Marshall began as one of the lead activists for the union campaign. (Tr. 37, 71, 161, 452, 1037). During this time, Marshall also concertedly advocated for her colleagues who suffered through an inappropriate and sexually explicit video. (Tr. 292, 299). She advocated for her colleague who needed assistance in the department. (Tr. 229, 1049). Prior to the start of the union campaign, Marshall had exemplary performance evaluations and had never been disciplined by Respondent. (Tr. 197; GC Ex. 29(a-h)).

On June 26, Marshall was issued a day and a half suspension. (GC Ex. 12). On July 10 she was issued a verbal warning. (GC Ex. 15). On August 31, she was demoted by a director who had only been at the facility for about a week. (Tr. 915; GC Ex. 14). On October 30, Marshall received an unbefitting annual performance evaluation. (GC Ex. 29). Not only were these negative personnel actions based on union and protected concerted activities, they were based, at least in part, on unlawful rules found in Respondent's Nursing Code of Conduct.

1. Marshall's June 26 Suspension

June 26 was a very busy day in ICU and the department was short staffed. (Tr. 197). Marshall, the charge nurse and team leader for the day shift, also had patients. (Tr. 197). Marshall tried multiple methods for resolving the holes in the schedule before and through June 26. (Tr. 197; GC Ex. 21b, 25b). She sent emails, phone calls, text messages, all of which continued through June 26. (Tr. 197, 324-25, 328-29; GC Ex. 21b, 25b). Marshall had also made the staffing shortage known during that and the previous days' bed meetings. (Tr. 198, 324; GC Ex. 21b, 25b). Marshall even came in on her day off to help shore up staffing. (Tr. 327; GC Ex. 21b, 25b). Marshall maintains that she made the phone calls, she never told anyone otherwise, and she made the same assertion during her suspension meeting later that day. (Tr. 199, 328-29; GC Ex. 21b, 25b).

Ogundele claims she called an emergency bed meeting to see if she could get more staff on June 26 because Marshall called and said that they were short staffed. (Tr. 713, 715). However, Linda Crumb also claims she called the bed meeting. (Tr. 874). Ogundele testified that at the emergency bed meeting it was decided that "the **directors** would go back to their unit, see that we call somebody to help us here." (Tr. 717-18, emphasis added). Ogundele testified that after the meeting she went with Brown to his office when he called staff to attempt to bring in enough staff for the night shift. (Tr. 704). Brown called Scott Goldsmith to act as charge that evening, and he agreed. (Tr. 704, 1021, 1048). Brown agreed that a team leader cannot offer to change who is in charge for a particular shift. (Tr. 1049). Ogundele testified that Brown asked Marshall for a list of who she called so he would not make any repeat calls and *only then* did Marshall say she did not call anyone. (Tr. 705). However, Ogundele also testifies that after they obtained Goldsmith to work the evening shift, Respondent they had enough staff for the evening.

(Tr. 705). Brown should not have had to make more calls if the department already had enough staff. (Tr. 704, 708). Marshall denies that Brown asked her for a list of who she called. Ogundele also testified that Marshall said that she did not call anybody because it was not her job, which Marshall denies. (Tr. 705). Crumb was not present on the unit on June 26 for any of the discussion that allegedly took place between Marshall, Ogundele, and Brown. (Tr. 103). Crumb allegedly "found out from witnesses that she then stated that she did not make phone calls to get staff in." (Tr. 836).

It is not just the team leader's role to secure adequate staffing. (Tr. 308, 338, 442). The director and others also help to fill in scheduling holes. (Tr. 160, 449-50, 457). Ultimately, scheduling in the ICU is the director's responsibility. (Tr. 153, 155, 446). When called by team leaders, nurses often refuse to take extra shifts because there is no incentive to do so and they are burnt out. (Tr. 446). Monacelli observed that the director would have a higher success rate in getting staff to agree to come into work. (Tr. 452). That is because when securing staffing the director could offer something Marshall and her colleagues could not; incentive pay,[5] overtime pay, and the higher paying role of charge nurse. (Tr. 160, 444-45, 1049).

Monacelli testified that she was unaware that charge nurses and team leaders were held responsible for calling staff. (Tr. 446). Regardless, it was Marshall's practice to specifically try to fill the holes, for both her shift and the night shift, by texting and calling people multiple times a week when she was working. (Tr. 155). Monacelli testified that Marshall made more phone calls than she made. (Tr. 451). Monacelli also testified that during last summer, Marshall would text or call her one to two times a week to come to work to help fill in holes. (Tr. 449).

[5] Incentive pay is extra money offered to nurses to work above and beyond their hourly salary. (Tr. 160).

In the afternoon on June 26, a disciplinary meeting was held with Ogundele, Crumb, Brown, and Marshall in attendance. (Tr. 720-21). Ogundele testified inconsistently about whether she discussed with anyone the events of the day before or after the meeting. (Tr. 721-24, 759, GC Ex. 36). Crumb testified that Ogundele called her and also came to see her. (Tr. 874). Ogundele and Crumb had conflicting accounts about whether Marshall said at the meeting it was not her job to make the calls and that she actually made the calls. (Tr. 723, GC Ex. 36). Marshall testified that during her disciplinary meeting Marshall maintained that she did call staff.[6] (Tr. 105, 309, 316).

The disciplinary process at the hospital involves Pedersen, the director of the employee's department, and at times the director's supervisor, who may be another Vice President. (Tr. 34). While employee disciplines were discussed with the CEO, Pedersen described the frequency as "rare." (Tr. 35). The CEO is not involved with the daily operations of each department. (Tr. 36). Pedersen admitted that he attended the meeting where the decision to suspend Anne Marshall was made. (Tr. 53). The other people in attendance at this meeting were the CEO, the Medical Director, and the Vice President of Nursing. (Tr. 54). With the rare exception of the CEO, none of these people were included on the list of those involved in staff disciplines. (Tr. 34). Furthermore, none of the people in attendance at the decision making meeting were present for

[6] During her 611(c) testimony, Crumb failed to remember whether Marshall said she did or did not make phone calls during the June 26 disciplinary meeting, despite refreshing her recollection with her affidavit. (Tr. 108). In her affidavit, which was read into the record, Crumb stated "I also told her that she was not truthful when she said that she had called staff when she admitted later that she had not called any staff. She said that she did make the calls." The affidavit further stated "She maintained that she made the calls." (Tr. 108). Crumb further failed to remember that Marshall did not say it was not her job to make the calls. (Tr. 109). This is also belied by Crumb's affidavit. (Tr. 109). Crumb also failed to recall the majority of the contents of the follow-up meetings to Marshall's June 26 meeting. (Tr. 122-26).

Marshall's alleged misconduct. (Tr. 54). None of the people making the decision to suspend Marshall personally spoke to her about the incident or checked to see if the calls had been made. (Tr. 58).

Crumb claims, however, that it was her decision to suspend Marshall and she only conferred with Pedersen "to be sure that we were following the disciplinary process appropriately." (Tr. 876). Crumb is not involved in the daily comings and goings of the staff nurses in the ICU. (Tr. 98). The code of conduct was part of the documents she relied on in suspending Marshall. (Tr. 881). Though Crumb mentioned a progressive disciplinary process, Marshall's suspension did not follow Respondent's progressive process as she had never been issued any previous discipline. (Tr. 197, GC Ex. 29).

In the end, Marshall's alleged untruthfulness about not making phone calls was found to be a violation of the nursing code of conduct. (Tr. 105; GC Ex. 12). As a result, Marshall was suspended for a day and a half. Monacelli testified that before the campaign she had refused her director's request to make phone calls to bring in staff because she was overwhelmed with work. (Tr. 450). She was never reprimanded or disciplined for that refusal. (Tr. 451).

In the follow-up meeting on about July 1, Crumb believed Marshall was on the schedule as a charge nurse and she did not remember Brown leaving the meeting to check and see if she was needed. (Tr. 116). However, Brown recalls having done so, and the recording of the meeting and even Crumb's own instructions indicates she was not. (Tr. 1048; GC Ex. 11, 21b). In the follow-up meeting to the suspension Crumb admitted that the incident was a miscommunication. (Tr. 220, GC Ex. 25b).

2. Marshall's July Verbal Written Warning

One of Marshall's colleagues, Robert Styer, had a patient that needed to be transported. (Tr. 229). Styer was responsible for two patients, one was critically ill on multiple infusions that needed 15 minute observation for titration, and the second patient needed to be transported for a test that could potentially last four hours. (Tr. 229). After approaching Brown for assistance with no success, Styer approached Marshall for help. (Tr. 229). Marshall approached Brown on Styer's behalf to ask for a ward clerk. (Tr. 229, 1049). Brown admitted that it was not her patient that she was requesting help transporting. (Tr. 1049). Brown and Marshall stood in the back hallway together while he made a phone call. (Tr. 231, GC Ex. 26). Brown alleges that Marshall stood in his personal space though Marshall testified that she stood arm's length from him. (GC Ex. 25a). Earlier that same shift Marshall brought to Brown's attention that the next 11 days had holes in the schedule and asked for help in resolving the issue. (Tr. 1050, GC Ex. 49).

Crumb investigated this interaction between Marshall and Brown by calling each staff member that was working on that day to ask if they had seen or heard anything about the interaction. (Tr. 905). As her handwritten notes explain, she interviewed eight staff members that day and "all 8 did not witness anything." (GC Ex. 42). This was a different procedure than Crumb took in June. Crumb did not interview all of the staff who worked June 24 and June 26 prior to Marshall's suspension. (Tr. 970). Despite her inconclusive interviews, Crumb issued Marshall a verbal written warning anyway.

3. Marshall's August 31 Demotion from Team Leader and Charge Nurse Roles

On August 31, Marshall and Sandra Beasley, the interim ICU director, met for the first time. Marshall testified that she introduced herself, shook hands with Beasley, and continued with getting morning report from her colleague. (Tr. 237). Marshall denies giving Beasley the middle finger during her first interaction with her. (Tr. 237). Crumb testified that Beasley told

her that Marshall flipped off Beasley during their first interaction. (Tr. 955). However, that fact was omitted from Crumb's affidavit. (Tr. 958). Additionally, in the email Beasley originally sent to Crumb, she wrote that Marshall "rolled her eyes and flipped her hand in a dismissing gesture." (Tr. 961).

Later that morning, Beasley approached Marshall and requested that Marshall find her for bed meeting. (Tr. 237). Marshall searched for Beasley in both her office and the back hallway but failed to locate her. (Tr. 238). In an effort to not be late to the meeting, Marshall left without Beasley. (Tr. 238). Beasley later claimed that she needed an escort to find the meeting, but she arrived at bed meeting without anyone. (Tr. 238, 915). That same day, Beasley also observed Marshall having a respiratory therapist signing a union card in the break room. (Tr. 163, 406-07).

Later that day, Marshall was unexpectedly called into a conference room with Beasley and another director, Kansas Underwood. (Tr. 239-40). Beasley claimed she was upset that Marshall failed to take her to bed meeting and that Marshall was not friendly enough during their first interaction. (Tr. 239). Kansas Underwood,[7] director of the fourth floor, was in attendance as a witness to the meeting. (Tr. 779). Kansas testified that one of the issues discussed at the meeting was that "when Sandra said hello to Anne, she was sort of flippant about it and not kind." (Tr. 779, 784). Underwood never described the act of Marshall flipping off Beasley as a topic discussed. (Tr. 779). In fact, she specifically could not remember any examples being discussed. (Tr. 785). Marshall told Beasley that she thought she knew what the meeting was about. (Tr. 240). Despite no one ever mentioning the union previously, Beasley said that the meeting had nothing to do with the union. (Tr. 240). Marshall said that she would not discuss the

[7] Underwood had sent an email to Pedersen around the time the union campaign began, in May, reporting about the cath lab approaching her staff. (Tr. 783, GC Ex. 37).

union with Beasley and she left the meeting. (Tr. 240). There was no plan to demote Marshall out of her charge nurse or team leader role prior to the meeting on August 28. (Tr. 128, 926-27). In fact, that decision was not made until after the meeting. (Tr. 129).

A few days later Marshall was demoted. (Tr. 240). At this time, Beasely had only been with Respondent for approximately one week. (Tr. 915). It was the first day she had interacted with Marshall. (Tr. 915). Prior to the demotion meeting Marshall asked for a colleague as a witness. (Tr. 241). Beasley told her no and Pedersen was suggested. (Tr. 240). Naturally, Marshall was uncomfortable with that suggestion. (Tr. 241). Eventually, social worker Kim Pacquin was agreed upon. (Tr. 241). During the disciplinary meeting, Beasley told the attendants that the meeting was to be kept confidential. (GC Ex. 26(a), 26(b)).

According to Respondent, Marshall was demoted because it was the same behavior she had been displaying for months. (Tr. 129-30, 919, 962-63; GC Ex. 13). Specifically, Crumb cites the June and July incidents as the basis for the demotion. (Tr. 929). Counsel for Respondent admitted as much when he said "it was a series of events that started on June 24th and culminated on June 26th that resulted in her demotion." (Tr. 654).

4. Marshall's 2015 Annual Performance Evaluation Reflects her Disciplines

For the first time Crumb performed the annual evaluations for the nurses in the ICU. (Tr. 98). The evaluations affect staff raises and bonuses. (Tr. 245). Crumb testified that she told the nurses, in a staff meeting, that the evaluations would remain the same except for the personal accountability portion. (Tr. 99). The nurses who testified about this staff meeting claim that this caveat was never explained. (Tr. 245, 398, 429-30, 431). Marshall's evaluation was a full point lower than her previous evaluation. (Tr. 249, GC Ex. 29). The only change was a box checked "no" for "failing to exhibit honest and ethical behavior." (Tr. 937; GC Ex. 29(h)). Crumb had

made that determination. (Tr. 937-38). Again, Crumb admits that this was checked no because of "all the behavior issues that had happened throughout the year, from the June – the June issues with not being truthful about calling staff in, twice; and her behaviors as far as not being truthful." (Tr. 938). The only other changes made to staff evaluations were for mandatories, such as education requirements. (Tr. 938-39).

E. Respondent's Discipline of Scott Marsland

Marsland testified that he discussed the biggest issue in the ED, nurses' inability to take breaks consistently, with Mathews on several occasions. (Tr. 491). Marsland described the discussion amongst his colleagues about the inability to take breaks as "part of the air we breathe in at Cayuga Medical Center." (Tr. 502). Specifically, on a weekly basis the nurses would discuss their disgruntlement about Deb Scott's ability and whether or not she was capable of covering breaks. (Tr. 504, 530). There were also a few discussions about Gail Peck's ability to cover for breaks based on her ability. (Tr. 505). There were not as many discussions about Peck because she was not being used to cover breaks as frequently. (Tr. 505). Both Deb Scott and Gail Peck work mostly in the low acuity fast track section of the emergency department. (Tr. 504-05, 527). Durkee specifically brought up the clinically competent break coverage issue with Kevin Harris. (Tr. 530). Mathews believed Durkee may have even brought the lack of break issue to her attention. (Tr. 576).

In June, Marsland wrote a letter to the Department of Labor about the lack of breaks in the Emergency Department at Respondent's facility. (Tr. 502, 531, 584). The Department of Labor (DOL) charge alleged that Emergency Department nurses were unable to take their breaks. (Tr. 466). Marsland filed this charge on behalf of his colleagues and himself. (Tr. 502). Even before the DOL charge was filed, Mathews knew that nurses had complained about lack of

breaks. (Tr. 468, 574, 576). She had even received an email from the Vice President of Patient Care Services, Susan Nohelty, to that effect in June. (Tr. 468, GC Ex. 31).

Mathews held a staff meeting on September 24. (Tr. 470). The 7:15 am meeting was held in an area where patients were not within earshot. (Tr. 470). Mathews began the meeting by discussing breaks. (Tr. 471). This was not even the first staff meeting where the issue of nurses not taking their daily breaks had been addressed. (Tr. 471). Mathews specifically mentioned a particular day that Deb Scott had gone around with Gail Peck offering to cover patients for nurses needing to take a break. (Tr. 476, 506). Neither Deb Scott nor Gail Peck were in attendance at the meeting. (Tr. 477, 508).

Marsland spoke up at the meeting and said that Deb Scott offered to cover for him but that she was not a competent nurse to cover his patients. (Tr. 480). As a result, he did not take a lunch on the day being mentioned. (Tr. 480). Marsland even wanted to support his position by providing specific examples[8] but Mathews refused. (Tr. 482). Marsland went on to mention that Gail Peck was a new nurse who did not even know how to mix a banana bag and should not be left alone in fast track while Deb Scott offered to cover people for breaks. (Tr. 482, 507). Mathews admitted that Gail Peck just began in the ED and she would not be competent to cover his patients. (Tr. 483). Before he stopped talking, Marsland said "You know, we're all aware that there is a complaint within the New York State Department of Labor about breaks at this point. And sooner or later the hospital is going to have to follow New York State labor law." (Tr. 508).

[8] Marsland had been tabling in the cafeteria the day before the staff meeting and around lunch time another nurse came down to join him. (Tr. 506). The other nurse proceeded to tell him that she was really uncomfortable because she was handling beds 11-15 and Deb Scott was covering her group. (Tr. 506).

On October 5, Mathews called Marsland into a meeting with her in her office. (Tr. 484). At this meeting she issued him a first verbal written warning for his conduct at the meeting on September 24 for violating the code of conduct. (Tr. 484-85). Mathews identified "Criticizes co-workers or other staff in the presence of others in the workplace or in the presence of patients" as a rule Marsland violated. (Tr. 485; GC Ex. 3). This is also documented in the written verbal warning he was issued. (Tr. 485; GC Ex. 32).

During direct examination, Mathews testified that she wrote this by herself, however she actually consulted with Human Resources in an attempt to issue Marsland something more than just a violation of the code of conduct. (Tr. 588, GC Ex. 35). Interestingly, Mathews testified that as a nurse herself, she is held accountable to the nursing code of conduct. However, she agreed that she circulates patient surveys to all of the nurses and doctors which includes nurse names and criticisms linked specifically to those nurses. (Tr. 607). She has never been disciplined for circulating those surveys. (Tr. 607).

III. ANALYSIS

The evidence and applicable case law establish that throughout the union campaign, Respondent committed multiple violations of Section 8(a)(1) and (3) of the Act. These violations range from bad rules to unlawful disciplines. Respondent should be held accountable for each violation.

A. Respondent's Nursing Code of Conduct Violates the Act

Under the Board's decision in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), the mere maintenance of a work rule can violate Section 8(a)(1) of the Act if the rule has a chilling effect on employees' Section 7 activity. A rule that does not explicitly prohibit Section 7 activity is still unlawful if 1) employees would reasonably construe the rule's language to prohibit Section 7 activity; 2) the rule was promulgated in response to union or other Section 7 activity; or 3) the rule was actually applied to restrict the exercise of Section 7 rights. [cite case]

Employees have a Section 7 right to discuss wages, hours, and other terms and conditions of employment with fellow employees, as well as with nonemployees, such as union representatives. Thus, an employer's confidentiality policy that specifically prohibits such employee discussions or that employees would reasonably understand to prohibit such discussion, violates the Act. Similarly, a confidentiality rule that broadly encompasses "employee" or "personnel" information, without further clarification, will reasonably be construed by employees to restrict Section 7-protected communications. *See Flamingo-Hilton Laughlin*, 330 NLRB 287, 288 n.3, 291-92 (1999). Here, Respondent's rule to"Respect[] confidentiality and privacy at all times, including co-workers, adhering to the Social Networking Policy" is unlawful. Such a rule is overbroad because it fails to provide any context for what

confidentiality employees need to maintain. For example, the Board has found similar rules that the following to be unlawful:

> Courtesy is the responsibility of every employee. Everyone is expected to be courteous, polite and friendly to our customers, vendors and suppliers, as well as to their fellow employees. No one should be disrespectful or use profanity or any other language which injures the image or reputation of the Dealership.

Knauz BMW, 358 NLRB No. 164 (2012).

Thus Respondent's rule which states, "[i]nteracts with others in a considerate, patient and courteous manner" is unlawful. This rule is overbroad and employees would reasonably understand the rule to restrict behaviors that could be considered inconsiderate or discourteous, like protected activities. Thus, this rule is unlawful.

Employees also have the Section 7 right to criticize or protest their employer's labor policies or treatment of employees. Thus, rules that can reasonably be read to prohibit protected concerted criticism of the employer will be found unlawfully overbroad. For instance, a rule that prohibits employees from engaging in. "disrespectful," "negative," "inappropriate," or "rude" conduct towards the employer or management, absent sufficient clarification or context, will usually be found unlawful. *See Casino San Pablo*, 361 NLRB No. 148, slip op. at 3 (Dec. 16, 2014); *Claremont Resort & Spa*, 344 NLRB 832 (2005) (rule prohibiting "[n]egative conversations about associates and/or managers" found unlawful). Moreover, employee criticism of an employer will not lose the Act's protection simply because the criticism is false or defamatory, so a rule that bans false statements will be found unlawfully overbroad unless it specifies that only maliciously false statements are prohibited. *Id.* at 4.

In *Quicken Loans, Inc.*, 359 NLRB No. 141, slip op (2014), affirmed in *Quicken Loans, Inc.*_361 NLRB No. 94, slip op at 1, fn.1 (2014),[9] the Board found unlawful the employer's "Non-Disparagement" rule prohibiting employees from "criticizing, ridiculing, disparaging or defaming the company or its products etc. . . . through any written or oral statement or image . . . [including] via websites, blogs, postings on the internet or emails." In finding that that the rule chilled employees' Section 7 rights, the Board applied *Albertson's Inc.*, 351 NLRB 254, 259 (2007) stating:

> There can be no doubt that an employee reading these restrictions could reasonably construe them as restricting his rights to engage in protected concerted activities. Within certain limits, employees are allowed to criticize their employer and its products as part of their Section 7 rights, and employees sometime do so in appealing to the public, or to their fellow employees, in order to gain their support. A reasonable employee could conclude that the prohibitions contained in the Agreement prohibited them from doing so. The Non-Disparagement provision therefore violates Section 8(a)(1) of the Act.

Similarly, the Board in *Kinder-Care Learning Centers*, 299 NLRB 1171, 1171-1172 (1990), articulated that "[u]nder Section 7 of the Act, employees have the right to engage in activity for their mutual aid or production" and that unlawful restrictions on this right included restricting employees' communications about their employment "to other employees, an employer's customers, its advertisers, its parent company, a news reporter, and the public in general."

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[9] In adopting the judge's finding, the Board also stated that it relied on *Hills & Dales General Hospital*, 360 NLRB No. 70, slip op. at 1 (2014), and *Valley Hospital Medical Center*, 351 NLRB 1250, 1252 (2007) (quoting *Richboro Community Mental Health Council*, 242 NLRB 1267, 1268 (1979)), enfd. 358 Fed. Appx. 783 (9th Cir. 2009). *Id*. at fn. 1

Accordingly, three of Respondent's rules are unlawful. First, the rule that requires a nurse be "honest, truthful, and respectful at all times" is unlawfully overly broad. This rule requires "respect" which can be construed in a number of ways that violate Section 7. Next, "Utilizes proper channels to express dissatisfaction with policies and administrative or supervisory actions and without fear of retaliation" is unlawful. Such a rule implies that there are improper channels for expressing dissatisfaction. Finally, the rule that states "Displays behavior that would be considered by others to be intimidating, disrespectful or dismissive" is unlawfully overbroad. The illegality of this rule is highlighted when applied to discipline an employee for discussing a protected issue with management.

In *William Beaumont Hospital*, 363 NLRB No. 162, the Board found the following rule unlawful: "Negative or disparaging comments about the moral character or professional capabilities of an employee or physician made to employees, physicians, patients, or visitors." The Board further found that a rule prohibiting "negative conversations" about coworkers and managers unlawful. *T-Mobile*, 363 NLRB No. 171 (2016), citing ***Claremont Resort & Spa***, 344 NLRB 832, 832 (2005). In addition, employees' right to criticize an employer's labor policies and treatment of employees includes the right to do so in a public forum. *See Quicken Loans, Inc.*, 361 NLRB No. 94, slip op. at 1 n.1 (Nov. 3, 2014). Rules that tell employees to refrain from saying anything to each other that might be deemed offensive or evoke a response from another employee was found to be unlawful. *Tenneco Automotive*, 357 NLRB No. 84 (2011). The Board's law makes clear the following rule is unlawful "Criticizes co-workers or other staff in the presence of others in the workplace or in the presence of patients." Again, this rule's illegality is highlighted when it was applied to discipline an employee for engaging in protected concerted activity.

B. Union Related/Animus 8(a)(1) violations

1. Pedersen Emails/Notices to Employees are Violations of 8(a)(1)

Encouraging employees to report on other employees for their union activity is an unlawful means of surveillance and a violation of Section 7. As explained in *First Student and CSEA, Local 760*, 341 NLRB No. 19 at 136 (2004) the legality of these statements are based on whether they are "so vague as to invite employees generally to inform on fellow workers who were engaged in union activity." citing, *Liberty House Nursing Homes*, 245 NLRB 1194, 1197 (1979). In *Greenfield Die & Mfg. Corp.*, 327 NLRB 237, 238 (1998) the Board held that employers violate the act "when they invite their employees to report instances of fellow employees' bothering, pressuring, abusing, or harassing them with union solicitations and implying that such conduct will be punished." The Board further reasoned that such actions by the employer are "calculated to chill even legitimate union solicitations." Here, employees were asked to report if they subjectively felt they were being harassed or intimidated and the there was more than a mere implication of punishment as a side effect of having done so.

Pedersen admitted to sending ten letters and emails to the staff about the organizing efforts. (Tr. 37, GC Ex. 2). These letters and emails were sent to the nurse electronic distribution group, which includes all 350 nurses. (Tr. 37-38). Employees described email as the main method of contact between Respondent and its employees. (Tr. 150, 453, 492). The first email, which was sent on May 7, 2015 was sent via email and distributed in person. (Tr. 41, GC Ex. 39, 47). In part, that email reads, "If you feel you are being harassed or intimidated feel free to contact your supervisor, director, or security." (GC Ex. 2a). The May 7, 2015 email encourages calling security while the second states a complaint should be filed and the behavior will be addressed by the department director. (GC Ex. 2a). The email sent August 26, 2015 states in part,

"If you feel that you continue to be harassed you have every right to file a complaint in our incident reporting system, and notify your Director so that we can address the behavior with the individual involved." (GC Ex. 2f). Both of these statements are unlawful requests to report on other employees. (GC Ex. 2a, 2f).

2. Cafeteria Removal

Vice President of Human Resources, Alan Pedersen, told employees Marshall and Marsland that they could not distribute union literature in the cafeteria. This prohibition is overbroad because it explicitly restricts Section 7 activity. A broad prohibition such as this, which does not acknowledge employees' right to solicit and distribute material on behalf of a union on non-work time in non-patient care areas is unlawful. *Trus-Joint MacMillan*, 341 NLRB 369 (2004); *Waste Management of Palm Beach*, 329 NLRB 198 (1999). In fact, these employees were soliciting on non-work time in non-patient care areas. Even if Pedersen's comments could be construed to not explicitly restrict Section 7 activity, employees would reasonably understand them to restrict Section 7 rights to solicit on non-work time.

3. Unlawful Removal of Union Materials from Break Rooms and Bulletin Boards

Respondent unlawfully restricted the distribution and posting of Union materials. An employer violates the Act if it prohibits "the posting of material relating to and in the course of concerted activity of its employees, while having previously allowed the posting of other miscellaneous matters by the employees." *Waste Management, Inc.*, 330 NLRB 634, 635- 636 (2000) (citing *Vincent Steak House*, 216 NLRB 647 (1975) *aff'd*, 559 F.2d 187 (D.C. Cir.) (table)); *Alle-Kiski Medical Center*, 339 NLRB 361 (2003) (enforcement of policy discriminatory where employer permitted solicitations such as Girl Scout cookies, office pools, and hoagie sales to benefit a local school); *BRC Injected Rubber Products, Inc.*, 311 NLRB 66, 73-74 (1993)

(finding disparate treatment where employer permitted sale of candy, Girl Scout cookies, and other products by employees).

Here, Respondent admitted that employees are permitted to leave materials on break room tables and post materials on bulletin boards. Despite this, starting in May Respondent removed union materials from break room tables and took union materials down from bulletin boards, sometimes at a frequency of four times a shift. (Tr. 1007, 1035, GC Ex. 22, 23, 24, 44, 47). Crumb took the stance that "they have the right to put up and we have the right to take down." (GC Ex. 24). This includes taking away non-posted material. (GC Ex. 24). Crumb went even further by sending the following email to senior management "When you make your rounds please remove Union material at time clocks and break rooms or anywhere else you find them. Security has been instructed to do the same. They have the right to put up and we have the right to take down." (GC Ex. 22). Respondent did not establish that it had a practice or policy of banning any postings other than Section 7 related material. Furthermore, Respondent allows a wide array of non-work related postings on its community bulletin board, and it banned the distribution and posting of union-related materials based purely on their Section 7 character. Accordingly, any asserted posting practice/policy purely based on content rather than type is unlawful under *Register Guard*, 351 NLRB 1110 (2007), supplemented by 357 NLRB No. 27 (2011), because it targets only Section 7 related material.

Further, Respondent removed union literature from areas where employees frequently take their breaks and are allowed to keep other non-work related materials and literature. The Board has held that an employer's right to preclude distribution of literature in working areas does not extend to a mixed use area. *United Parcel Service*, 327 NLRB 317 (1998). In this case,

Respondent interfered with employee distribution in its mixed-use areas in a disparate manner. Accordingly, Respondent's actions in removing pro-union literature violated the Act.

4. Brown's Interrogation of Marshall Violated the Act

In considering whether a statement by an employer to employees violates Section 8(a)(1), the Board applies an objective standard. The test is whether, under all the circumstances, a statement "reasonably tends to restrain, coerce, or interfere with the employee's rights." *Waste Management de Puerto Rico,* 348 NLRB No. 26, slip op. at 6 (September 29, 2006), citing *GM Electrics*, 323 NLRB 125, 127 (1997; *Solvay Iron Works*, 341 NLRB 208, 216 (2004), citing *Rossmore House*, 269 NLRB 1176, 1177 (1984), *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985)). The Board does not consider either the motivation behind the statement or its actual effect. *Sara Lee d/b/a International Baking Company and Earthgrains*, 348 NLRB No. 76, slip op. at 19 (November 22, 2006), citing *Miller Electric Pump and Plumbing*, 334 NLRB 824 (2001). Here, Brown telling an employee that he knew she was the ringleader and that if she did not stop Human Resources would get involved are coercive. (Tr. 193, 286).

5. Ogundele's Facebook Posts are Threats and 8(a)(1) Violations

Again, in considering whether a statement by an employer to employees violates Section 8(a)(1), the Board applies the same objective standard. The test is whether, under all the circumstances, a statement "reasonably tends to restrain, coerce, or interfere with the employee's rights." *Waste Management de Puerto Rico,* 348 NLRB No. 26, slip op. at 6 (September 29, 2006), citing *GM Electrics*, 323 NLRB 125, 127 (1997); *Solvay Iron Works*, 341 NLRB 208, 216 (2004), citing *Rossmore House*, 269 NLRB 1176, 1177 (1984), *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985).

"Suggestions that employees who are dissatisfied with working conditions should leave rather than engage in union activity in the hope of rectifying matters coercively imply that employees who engage in such activity risk being discharged." *Jupiter Medical Center Pavilion*, 346 NLRB 650, 651 (2006). The Board has consistently found employer statements that a union supporter who is unhappy should seek work elsewhere to be unlawful because such statements suggest that supporting a union is incompatible with continued employment. See *Paper Mart*, 319 NLRB 9, 9 (1995); *Tualatin Electric*, 312 NLRB 129, 134 (1993); *Roma Baking Co.*, 263 NLRB 24, 30 (1982). Similarly, telling employees that supporting the union will lead to unemployment are unlawful.

Employer threats directed at employees, including figurative threats of physical harm, which have a tendency to inhibit the free exercise of Section 7 rights violate Section 8(a)(1). *Cox Fire Protection*, 308 NLRB 793 (1992) (employer's figurative statement to an employee that he wanted to "kick his ass" because of the employee's union activity held unlawful); *see Remington Electric, Inc.*, 317 NLRB 1232 (1995) (Employer's threat that if an employee was involved in a particular investigation he was "going to break his fucking legs" held to be unlawful).

Threatening employees who supported the union by telling them that doing so would lead to unemployment is coercive. Ogundele testified that her response was specifically related to the union and the way it impacts employees who do not support the union. (Tr. 726-27). Florence Ogundele, house supervisor, first posted to Facebook saying that she could go from "nice to bitch in 20 second flat," that if Scott Marsland wanted to fight her she would do it face-to-face, not to mess with her, and to tell his disciples to do the same. (Tr. 77, GC Ex 8)."

Similarly, her second post reads, "To my fellow CMC who is tired of all the bullshit going on at work and the people supporting them this is what I want to say[.] I want you to look at the people who are sending you e mail, [sic] sending letters to you [sic] home and calling you to joined [sic] their cause after you told them to leave you alone. **I want you to take a good look at them, you will see that if you follow any one of them it will lead you to unemployment**, these people have nothing to lose." (GC Ex. 9 emphasis added). In her third post, Ogundele said "now that the ass hole [sic] mentioned my name, I will show him and all his followers that I am not the one to mess with I have nothing to lose," and "They pick the wrong person to pissed [sic] off. I will like anyone of them to confront me instead of gossiping. I saw them when I walked into the ICU today and don't have the guts to face me. Hell this shit is on and am tired of playing nice." (GC Ex. 10). These threats of unemployment and unspecified threats of violence violate the Act and are unlawful 8(a)(1) statements.

C. Other 8(a)(1) Violations

1. Respondent's statement about confidentiality in disciplinary meetings is unlawful

As the Board explains in *Banner Health System*, 362 NLRB No. 137 (2015) an employer limiting employee discussions of an ongoing disciplinary investigation unlawful when not outweighed by a legitimate business justification. The Board explained that employees have a Section 7 right to discuss discipline or ongoing disciplinary investigations involving themselves or their coworkers and such discussions are vital to an employee's ability to aid one another in addressing terms and conditions of employment with their employer.

Here, Respondent's only business justification was to save the employee from embarrassment, rather than a justification involving the integrity of the investigation. (Tr. 807, 812). Pedersen freely admitted that contents of disciplinary meetings should be kept confidential.

(Tr. 50). However, there is conflicting evidence regarding who made the statement of confidentiality.

Pedersen admitted that Linda Crumb told him that she told Anne Marshall and Kim Paquin during Marshall's demotion meeting that the contents should be kept confidential. (Tr. 50, 51). Moreover, the same was relayed in a position statement from Respondent's counsel which states, "[w]ith respect to the August 31, 2015 meeting that Ms. Paquin witnessed at Ms. Marshall's request, Ms. Crumb asked that the conversation remain confidential because CMH considers individual personnel actions to be private matters." (Tr. 811). Crumb claims that her statement of confidentiality was directed at Pacquin, not Marshall. (Tr. 931).

However, in the recorded disciplinary meeting Beasley can be heard telling the attendants that the meeting was to be kept confidential. (Tr. 387, GC Ex. 26(a), 26(b)). Beasley's statement was "whatever is said in this room, please keep it confidential." (GC Ex. 28(a), 28(b)). Furthermore, Marshall testified that Beasley's statement was not directed specifically at Pacquin. (Tr. 50-51). Not only is this discrepancy a credibility issue for Crumb, but it reinforces that it is Respondent's policy for the contents of disciplinary meetings to be kept confidential; a policy which is unlawful under the Act.

2. Respondent's Policies Regarding Wage Discussions are Unlawful

Generally, the Board finds unlawful rules which restrict employees from discussing earnings among themselves. *E.g.*, *Fredericksburg Glass & Mirror, Inc.*, 323 NLRB 165 (1997). It is unlawful for an employer to prohibit employees from discussing their salaries/wages – which is inherently concerted activity. Automatic Screw Products Co., 306 NLRB 1072, 1073 (1992); Triana Industries, 245 NLRB 1258 (1979); Scientific-Altanta, Inc., 278 NLRB 622, 624-625 (1986). To discourage employees from discussing wages is tantamount

to a rule prohibiting employees from engaging in protected concerted activity. *Custom Cut, Inc.*, 340 NLRB No. 17 (2003). In fact, even a rule "requesting" employees refrain from discussing wages is unlawful. ***Heck's, Inc.***, 293 NLRB 1111, 1119 (1989).

Here, Marshall testified that it was Respondent's general policy that employees are not permitted to discuss their wages. (Tr. 183, 382). Specifically, Marshall testified that her former director, Sean Newvine, told her that it was not permitted. (Tr. 184, 383-84). Marshall had also posted an article from the Ithaca Journal detailing the median range of salaries for nurses in the area based on years of experience. (Tr. 179-80; GC Ex. 19). Several nurses wrote their years of experience and corresponding salaries on the article. (Tr. 180; GC Ex. 19). Brown took down the article a few days later. (Tr. 180, 386). Marshall further testified that more recently Alan Pedersen, in the fall 2015, told a group of five nurses that it was inappropriate to discuss their wages at work. (Tr. 184, 381). Marshall and four other nurses were standing at the nurses' station discussing what some of the new nurses who were being hired were making and what they were making based on experience when Pedersen made his comment. (Tr. 184, 381). While he denied personally telling employees not to discuss salary information, Pedersen admitted that it is a generally accepted practice that employees are not to discuss salary information. (Tr. 48). He also admitted that letters have gone out to the staff which asked them to keep the contents of their salary information confidential. (Tr.49; GC Ex. 5, 6). Maintaining such a policy regarding wage discussions is an unlawful violation of 8(a)(1).

D. Respondent's Employee Disciplines are Unlawful

Respondent disciplined the two main union activists: Anne Marshall and Scott Marsland. These disciplines were based on unlawful rules, protected concerted activities, and union activities.

1. Respondent's Treatment of Marshall Violated the Act

Prior to the start of the union campaign in May 2015, Marshall had exemplary performance evaluations and had never been disciplined by Respondent. (Tr. 197; GC Ex. 29(a-h)). Between June and October 2015 Respondent issued Marshall four negative marks in her employee file. Marshall received a day and a half suspension, a verbal warning, and a demotion. These disciplinary actions were reflected on her annual performance evaluation by a full point reduction in her overall score. (GC Ex. 29).

A month prior to her first discipline Marshall began as one of the lead activists for the union campaign. (Tr. 37, 71, 161, 452, 1037). During this time, Marshall also concertedly advocated for her colleagues who suffered through an inappropriate and sexually explicit video. (Tr. 292, 299). She advocated for her colleague who needed assistance in the department. (Tr. 229, 1049). Not only were these negative personnel actions based on union and protected activities, they were based, at least in part, on unlawful rules found in Respondent's Nursing Code of Conduct. These unlawful basis

a. Marshall's June 26 Suspension was Based on Unlawful Rules and Union Activity

In *The Continental Group, Inc.*, 357 NLRB No. 39 (2011), the Board initially noted it had long adhered to and applied the principle that discipline imposed pursuant to an unlawfully overbroad rule is unlawful (the "*Double Eagle* rule"), *Double Eagle Hotel & Casino*, 341 NLRB 112 (2004). However, In *Continental*, the Board decided to limit the application of the *Double*

Eagle rule to discipline imposed because the employee engaged in protected conduct or in conduct that otherwise implicates the concerns underlying Section 7 of the Act.

Nevertheless, an employer will avoid liability for discipline imposed pursuant to an overbroad rule if it can establish that the employee's conduct actually interfered with the employee's own work or that of other employees or otherwise actually interfered with the employer's operations, and that the interference, rather than the violation of the rule, was the reason for the discipline. *Miller's Discount Dept. Stores*, 198 NLRB 281 (1972), enfd. on other grounds sub nom. *NLRB v. Daylin, Inc.*, 496 F.2d 484 (6th Cir. 1974); *see also Switchcraft, Inc.*, 241 NLRB 985 (1979), enfd. 631 F.2d 734 (7th Cir. 1980); *Wayne Home Equipment Co.*, 229 NLRB 654 (1977); *Singer Co.*, 220 NLRB 1179 (1975).

It is the employer's burden, not only to assert this affirmative defense, but also to establish that the employee's interference with production or operations was the actual reason for the discipline. In this regard, an employer's mere citation of the overbroad rule as the basis for discipline will not suffice to meet its burden. Rather, assuming that the employer provides the employee with a reason (either written or oral) for its imposition of discipline, the employer must demonstrate that it cited the employee's interference with production and not simply the violation of the overbroad rule. *See, e.g., Gerry's I.G.A.*, 238 NLRB 1141, 1151 (1978).

Here, CMC has failed to establish such a burden. According to Crumb, Marshall's behavior on June 26 violated two of the rules contained in the code of conduct. (Tr. 105, 115, 974-75). First, Marshall's alleged behavior violated the rule that requires that a nurse "Interacts with others in a considerate, patient and courteous manner." (Tr. 975). Next, According to Crumb, Marshall's alleged untruthfulness on June 26, 2015 was a violation of the nursing code of conduct. (Tr. 105, 115, 974). The code of conduct requires nurses be "honest, truthful, and

respectful at all times." (GC Ex. 3). Marshall was suspended for being untruthful and failing to exhibit honest and ethical behavior. (Tr. 115, 317; GC Ex. 12). As was previously discussed, these rules are unlawful. Relying on these unlawful rules to justify discipline violates the Act.

Based on an analysis of the Board's decisions, to establish unlawful discrimination under Section 8(a)(3) and (1) of the National Labor Relations Act, the General Counsel must demonstrate by a preponderance of the evidence that the employee was engaged in protected activity, that the employer had knowledge of that activity, and that the employer's hostility to that activity "contributed to" its decision to take an adverse action against the employee. *Director, Office of Workers' Comp. Programs v. Greenwich Collieries*, 512 U.S. 267, 278 (1994), clarifying *NLRB v. Transportation Management*, 462 U.S. 393, 395, 403 n.7 (1983); *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). [10]

Evidence that may establish a discriminatory motive - i.e., that the employer's hostility to protected activity "contributed to" its decision to take adverse action against the employee –

[10] The *Wright Line* standard upheld in *Transportation Management* and clarified in *Greenwich Collieries* proceeds in a different manner than the "prima facie case" standard utilized in other statutory contexts. *See Reeves v. Sanderson Plumbing Products, Inc*., 530 U.S. 133, 142-143 (2000) (applying Title VII framework to ADEA case). In those other contexts, "prima facie case" refers to the initial burden of production (not persuasion) within a framework of shifting evidentiary burdens. In the NLRA context, by contrast, the General Counsel proves a violation at the outset by making a persuasive showing that the employer's hostility toward protected activities was a motivating factor in the employee's discipline. At that point, the burden of persuasion shifts to the employer to prove its affirmative defense. Because *Wright Line* allocates the burden of proving a violation and proving a defense in this distinct manner, references to the General Counsel's "prima facie case" or "initial burden" are not quite accurate, and can lead to confusion, as General Counsel's proof of a violation is complete at the point where the General Counsel establishes by a preponderance of the evidence that employer's hostility toward protected activities was a motivating factor in the discipline.

includes: (1) statements of animus directed to the employee or about the employee's protected activities (see, e.g., *Austal USA, LLC*, 356 NLRB No. 65, slip op. at p. 1 (Dec. 30, 2010) (unlawful motivation found where HR director directly interrogated and threatened union activist, and supervisors told activist that management was "after her" because of her union activities)); (2) statements by the employer that are specific as to the consequences of protected activities and are consistent with the actions taken against the employee (see, e.g., *Wells Fargo Armored Services Corp.*, 322 NLRB 616, 616 (1996) (unlawful motivation found where employer unlawfully threatened to discharge employees who were still out in support of a strike, and then disciplined an employee who remained out on strike following the threat)); (3) close timing between discovery of the employee's protected activities and the discipline (see, e.g., *Traction Wholesale Center Co., Inc. v. NLRB*, 216 F.3d 92, 99 (D.C. Cir. 2000) (immediately after employer learned that union had obtained a majority of authorization cards from employees, it fired an employee who had signed a card)); (4) the existence of other unfair labor practices that demonstrate that the employer's animus has led to unlawful actions (see, e.g., *Mid-Mountain Foods*, 332 NLRB 251, 251 n.2, passim (2000), enfd. mem. 11 Fed. Appx. 372 (4th Cir. 2001) (relying on prior Board decision regarding respondent and, with regard to some of the alleged discriminatees, relying on threatening conduct directed at the other alleged discriminatees)); or (5) evidence that the employer's asserted reason for the employee's discipline was pretextual, e.g., disparate treatment of the employee, shifting explanations provided for the adverse action, failure to investigate whether the employee engaged in the alleged misconduct, or providing a non-discriminatory explanation that defies logic or is clearly baseless (*see, e.g., Lucky Cab Company*, 360 NLRB No. 43 (Feb. 20, 2014); *ManorCare Health Services – Easton*, 356 NLRB No. 39, slip op. at p. 3 (Dec. 1, 2010); *Greco & Haines, Inc.*, 306 NLRB 634, 634 (1992); *Wright*

Line, 251 NLRB at 1088, n.12, citing *Shattuck Denn Mining Co. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966); *Cincinnati Truck Center*, 315 NLRB 554, 556-557 (1994), enfd. sub nom. *NLRB v. Transmart, Inc.*, 117 F.3d 1421 (6th Cir. 1997)).

Once the General Counsel has established that the employee's protected activity was a motivating factor in the employer's decision, the employer can nevertheless defeat a finding of a violation by establishing, as an affirmative defense, that it would have taken the same adverse action even in the absence of the protected activity. *See NLRB v. Transportation Management*, 462 U.S. at 401 ("the Board's construction of the statute permits an employer to avoid being adjudged a violator by showing what his actions would have been regardless of his forbidden motivation"). The employer has the burden of establishing that affirmative defense. *Id*. Respondent's decision to suspend Marshall was in response to her union activity. There is no dispute that Marshall was a visible and active campaigner and that Respondent was aware of her activity. The animus in this case is overwhelming. Marshall left flyers on break room tables and posted union materials around the building. All of which were removed, forcing Marshall to replace it throughout her shift. Brown admitted to taking down her materials down four times a shift. (Tr. 1007, 1035). In a one-on-one meeting about the union, Brown told Marshall that he knew she was the ringleader and it had to stop or Human Resources would get involved. (Tr. 193, 286). Moreover, Marshall had never been disciplined prior to the start of the union campaign. In fact, historically her annual evaluations were practically flawless.

Respondent knew Marshall was the lead union organizer. Respondent even knew that Marshall was hanging union flyers in her unit, and was reminded of such less than a week before her suspension. (GC Ex. 45, 46). Marshall's suspension on June 26 did not follow Respondent's progressive process as she had never been issued any discipline prior to the suspension. (Tr.

197). The disciplinary process at the hospital involves Pedersen, the director of the employee's department, and at times the director's supervisor, who may be another Vice President. (Tr. 34). While employee disciplines were discussed with the CEO, Pedersen described the frequency as "not that often" and "rare." (Tr. 35). The CEO is not involved with the daily operations of each department. (Tr. 36). Pedersen admitted that he attended the meeting where the decision to suspend Anne Marshall was made. (Tr. 53). The other people in attendance at this meeting were the CEO, the Medical Director, and the Vice President of Nursing. (Tr. 54). With the rare exception of the CEO, none of these people were included on the list of those involved in staff disciplines. (Tr. 34). Furthermore, none of the people in attendance at the decision making meeting were present for Marshall's alleged misconduct. (Tr. 54). None of the people making the decision to suspend Marshall personally spoke to her about the incident or checked to see if the calls had been made. (Tr. 58). Crumb claims, however, that it was her decision to suspend Marshall and she only conferred with Pedersen "to be sure that we were following the disciplinary process appropriately." (Tr. 876). Crumb performed no investigation. In a subsequent meeting, Crumb admitted to Marshall that her suspension may have been based on a miscommunication. This further evidences a lack of investigation. Moreover, the discipline occurred not long after the union campaign began and there are over a dozen other violations alleged in this case in relation to the union campaign. Pedersen was having Brown surveil Marshall and document her behavior from the start of the campaign, well before she was ever disciplined. (GC. Ex. 48).

As the initial burden is met, Respondent has to prove that it would have taken the adverse action even absent the employee's protected activity. Respondent is unable to establish that proof in this case. There is no evidence that other disciplines of this type have been issued. Monacelli

admitted to openly refusing to make phone calls to her supervisor and was never disciplined. Additionally, the Employer maintains a progressive discipline policy that it failed to follow in issuing this suspension. Accordingly, it is clear that Marshall's suspension was unlawfully based on her union activity and unlawful rules.

b. Marshall's July Verbal Warning was Based on Unlawful Rules and Protected Concerted Activity

Again, in *The Continental Group, Inc.*, 357 NLRB No. 39 (2011), the Board initially noted it had long adhered to and applied the principle that discipline imposed pursuant to an unlawfully overbroad rule is unlawful (the "*Double Eagle* rule"), *Double Eagle Hotel & Casino*, 341 NLRB 112 (2004). However, In *Continental*, however, the Board decided to limit the application of the *Double Eagle* rule to discipline imposed because the employee engaged in protected conduct or in conduct that otherwise implicates the concerns underlying Section 7 of the Act.

On July 3 one of Marshall's colleagues, Robert Styer, had a patient that needed to be transported. (Tr. 229). Styer was responsible for two patients, one was critically ill on multiple infusions that needed 15 minute observation for titration and the second patient needed to be transported for a test that could potentially last four hours. (Tr. 229). After approaching Brown for assistance with no success, Styer approached Marshall for help. (Tr. 229). Marshall approached Brown on Styer's behalf to ask for a ward clerk. (Tr. 229, 1049). Brown and Marshall stood in the back hallway together while he made a phone call. (Tr. 231, GC Ex. 26). Brown admitted that it was not her patient that she was requesting help transporting. (Tr. 1049). Earlier that same shift Marshall brought to Brown's attention that the next 11 days had holes in the schedule and asked for help in resolving the issue. (Tr. 1050, GC Ex. 49).

The verbal warning was issued for violating a code of conduct rule because during this interaction, Marshall was allegedly standing in Brown's personal space. (Tr. 975; GC Ex. 25, 26). The rules Marshall was disciplined for violating in July are, "interacting with others in a considerate, patient and courteous manner," "being honest, truthful, and respectful at all times," and "avoiding inappropriate and disruptive communications/behaviors that include but are not limited to; displaying behaviors that would be considered by others to be intimidating, disrespectful or dismissive[;] [and] disregards or is insensitive to the personal space or boundaries of others." (GC Ex. 3, 15). These rules based on invading personal space were a basis for disciplining Marshall despite the fact that Brown is over six feet tall and athletically built while Marshall is less than five feet tall. (Tr. 234). Around this time Marshall had also filed a charge with NYSDHR on behalf of her colleagues for the abhorrent video Brown showed as an introduction to the staff. (Tr. 292, 299).

This time Crumb investigated this interaction by calling each staff member that was on that day to ask if they had seen or heard anything about the interaction. (Tr. 905). This was a different procedure than Crumb took in June. Crumb did not interview all of the staff who worked June 24 and June 26 prior to Marshall's demotion. (Tr. 970). For the July incident, Crumb's notes indicate that all eight staff members interviewed "did not witness anything." (GC Ex. 42). Crumb's description of the events, when reading from her type written notes which were included in the initial subpoena production, differs from her handwritten notes that required later production. (Tr. 905-09; GC Ex. 41, 42). In fact, the hand written notes indicate that one witness heard Brown and Marshall discussing staffing with no negativity. (GC Ex. 42). Another witness, Terrie Ellis (who was left off the typed version), claimed that Marshall asked Brown for help and he refused. (GC Ex. 42). Another witness, who was also left off the typed version, thought she

overheard something about the schedule, but nothing negative. (GC Ex. 42). In her initial interview with Crumb about the event, Marshall told Crumb that she was standing in the doorway to the kitchen. (GC Ex. 41, 42). In one of her interviews with Marshall about the incident Crumb never even asked Marshall how close she was standing to Brown. (GC Ex. 25b). Despite this, Marshall was still issued the discipline.

Marshall's interaction with Brown directly relates to the issue of staffing which is admittedly a term and condition of employment. (GC Ex. 42). Therefore, even if the activity was not protected concerted activity, it certain implicates the concerns underlying Section 7. As such, Anne's verbal warning was unlawful.

c. Marshall's August 31 Demotion was Unlawfully Based on Unlawful Rules, Union Activity, and Protected Concerted Activity

The analytical framework for establishing the demotion was based on unlawful rules, union activity, and protected concerted activity are no different than they were in establishing the same for the June 26 suspension. *See supra* Part III.D.1.a. Marshall's demotion was a continuation of the previously issued unlawful suspension and verbal warning. As the demotion was based on unlawful previous disciplines, the demotion itself is unlawful. *Dynamics Corp,*. 296 NLRB 1252, 1254 (1989), citing *Celotex Corp.*, 259 NLRB 1186 (1982) (discharge based on previously issued unlawful warnings violates Section 8(a)(3)).

On August 31 Marshall and Sandra Beasley, the interim ICU director, met for the first time. Marshall testified that she introduced herself, shook hands with Beasley, and continued with getting morning report from her colleague. (Tr. 237). Crumb testified that Beasley told her that Marshall flipped off Beasley during their first interaction. (Tr. 955). However, that fact was omitted from Crumb's affidavit. (Tr. 958). In the email Beasley originally sent to Crumb, she

wrote that Marshall "rolled her eyes and flipped her hand in a dismissing gesture." (Tr. 961). Marshall denies giving Beasley the middle finger during her first interaction with her. (Tr. 237).

Later that morning, Beasley approached Marshall and requested Marshall find her for bed meeting. (Tr. 237). Marshall searched for Beasley in both her office and the back hallway but failed to locate her. (Tr. 238). In an effort to not be late to the meeting, Marshall left without Beasley. (Tr. 238). Beasley later claimed that she needed an escort to find the meeting, but she arrived at bed meeting without anyone. (Tr. 238, 915). That same day, Beasley also observed Marshall having a respiratory therapist signing a union card in the break room. (Tr. 163, 406-07).

Later that day Marshall was unexpectedly called into a conference room with Beasley and another director, Kansas Underwood. (Tr. 239-40). Beasley claimed she was upset that Marshall failed to take her to bed meeting and that Marshall was not friendly enough during their first interaction. (Tr. 239). Kansas Underwood,[11] director of the fourth floor, was in attendance as a witness to the meeting. (Tr. 779). Kansas testified that one of the issues discussed at the meeting was that "when Sandra said hello to Anne, she was sort of flippant about it and not kind." (Tr. 779, 784). Underwood never described the act of Marshall flipping off Beasley as a topic discussed. (Tr. 779). In fact, she specifically could not remember any examples being discussed. (Tr. 785). Marshall told Beasley that she thought she knew what the meeting was about. (Tr. 240). Despite no one ever mentioning the union during the meeting, Beasley told Marshall that the meeting had nothing to do with the union. (Tr. 240). Marshall said that she would not discuss the union with Beasley and she left the meeting. (Tr. 240). There was no plan

[11] Underwood had sent an email to Pedersen around the time the union campaign began, May 2015, reporting about the cath lab approaching her staff. (Tr. 783, GC Ex. 37).

to demote Anne out of her charge nurse or team leader role prior to the meeting on August 28. (Tr. 128, 926-27). In fact, that decision was not made until after the meeting. (Tr. 129).

A few days later Marshall was demoted. (Tr. 240). At this time, Beasely had only been with Respondent for approximately a week and the issues arose the first day she had interacted with Marshall. (Tr. 915). Prior to the demotion meeting Marshall asked for a colleague as a witness. (Tr. 241). Beasley told her no and Pedersen was suggested. (Tr. 240). Naturally, she was uncomfortable with that. (Tr. 241). Eventually Kim Pacquin was agreed upon. (Tr. 241). During the disciplinary meeting, Beasley told the attendants that the meeting was to be kept confidential. (GC Ex. 26(a), 26(b).)

Marshall was demoted because it was the same behavior she had been displaying for months. (Tr. 129-30, 919, 962-63; GC Ex. 13). Specifically, Crumb cites to the two incidents in June and the incident in July as the basis for the demotion. (Tr. 929). Counsel admitted as much when he said "it was a series of events that started on June 24th and culminated on June 26th that resulted in her demotion." (Tr. 654). Crumb further claims that three rule violations led to Marshall's demotion. (Tr. 975-76).

One of the practical effects of this demotion was an impact on Marshall's union activity. As a team leader and charge nurse Marshall was viewed by her colleagues as a leader. (Tr. 161). In her roles as charge nurse and team leader Marshall attended bed meeting twice a day and was able to travel to different parts of the hospital to see people on other units. (Tr. 161).

d. Marshall's Evaluation is unlawful because it was based on Previous Unlawful Disciplines

Generally, issuing poor performance evaluations to employees based on protected/union activity is unlawful. *Mammoth Mountain Ski Area*, 342 NLRB No. 80 (2004). Adverse

evaluations based on previously issued unlawful disciplines are, likewise, unlawful. *Parkview Hospital, Inc.*, 343 NLRB 76, 76 (2004).

Here, Marshall was issued an unfavorable performance evaluation for "failing to exhibit honest and ethical behavior." (GC Ex. 29(h)). This was the first time this box was checked. Crumb guaranteed to the nurses that the 2015 evaluation would remain the same as the 2014 evaluation. Marshall's 2015 evaluation was a full point lower than her evaluation in 2014. Crumb admitted that Marshall was issued the evaluation for the behavior Marshall had been engaging in since June. (Tr. 115, 249). That same "behavior" referenced resulted in a suspension, verbal warning, and demotion. That same "behavior" referenced was based on an unlawful rule, union activity, and protected concerted activity. *See supra* Parts III.D.1.a-c.

2. Respondent's Treatment of Marsland Violates the Act

An active leader in the union campaign, Scott Marsland is a staff nurse in the Emergency Department at Cayuga Medical Center. (Tr. 487, 490). Mathews knew about Marsland's union activism because he was very vocal about his support. (Tr. 574). Mathews sent an email to Pedersen in May 2015 in which she reported the specific union affinity of her nurses. (Tr. 464, GC Ex. 30). Scott Marsland was identified as pro-union in this email. (Tr. 465, GC Ex. 30). Brown described Marsland as the most active organizer in the campaign. (Tr. 1038). In addition to his union activity, Marsland engaged in protected concerted activity by concertedly complaining about terms and conditions of employment and filing a department of labor charge to that effect. Marsland was disciplined based on that activity and the unlawful rules in the code of conduct.

Scott Marsland was disciplined for a rule previously found to be unlawfully overbroad. (GC Ex. 32). It is well-established that the existence of an overbroad rule violates the Act based

on its potential chilling effect on employees' exercise of their Section 7 rights. *See e.g.*, *Cardinal Home Products*, 338 NLRB 1004, 1005-06 (2003) (citations omitted). In fact, merely maintaining an overbroad rule inhibits employees considering engaging in legally protected activities by convincing them to refrain from doing so rather than risk discipline. *See NLRB v. Beverage-Air Co.*, 402 F.2d at 419; *J.C. Penney Co.*, 266 NLRB 1223, 1224 (1983). According to *Double Eagle Hotel & Casino*, 341 NLRB 112, 112 fn. 3 (2004), "[d]iscipline imposed pursuant to an unlawful rule violates the Act." However, the activity that violated the rule must "reasonably tend[ing] to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. *The Continental Group*, 357 NLRB No. 39 (2012). Specifically, such discipline is unlawful where an employee violated the rule by (1) engaging in protected conduct or (2) engaging in conduct that otherwise implicates the concerns underlying Section 7 of the Act. *Id*. To be protected, an activity must directly involve the employee's working conditions. *Waters of Orchard Park*, 341 NLRB 642, 642-45 (2004).

Here, it is already established that the rule cited during Marsland's discipline is overbroad. Moreover, he was engaging in protected conduct when he was disciplined. Marsland testified that he discussed the biggest issue in the emergency department, nurses' inability to take breaks consistently, with Mathews on several occasions. (Tr. 491). Marsland described the discussion amongst his colleagues about the inability to take breaks as "part of the air we breathe in at Cayuga Medical Center." (Tr. 502). Specifically, on a weekly basis the nurses would discuss their disgruntlement about Deb Scott's ability and whether or not she was capable of covering breaks. (Tr. 504, 530). There were also a few discussions about Gail Peck's ability to cover for breaks based on her ability. (Tr. 505). Durkee specifically brought up the clinically competent break coverage issue with Kevin Harris. (Tr. 530). Mathews believed Durkee may

have even brought the lack of break issue to her attention. (Tr. 576). There were not as many discussions about Peck because she was not being used to cover breaks as frequently. (Tr. 505). Both Deb Scott and Gail Peck work mostly in the fast track section of the emergency department. (Tr. 504-05, 527).

In June 2015 Marsland wrote a letter to the Department of Labor about the lack of breaks in the Emergency Department at Respondent's facility. (Tr. 502, 531, 584). The Department of Labor (DOL) charge alleged that Emergency Department nurses were unable to take their breaks. (Tr. 466). Marsland filed this charge on behalf of his colleagues and himself. (Tr. 502). Even before the DOL charge was filed, Mathews knew that nurses had complained about lack of breaks. (Tr. 468, 574, 576; GC Ex. 31). She had even received an email from the Vice President of Patient Care Services, Susan Nohelty, to that effect in June 2015. (Tr. 468, GC Ex. 31). That email states, "In light of the union activity, John would like a plan to be put in place as to how we can get staff to take their meal breaks." (GC Ex. 31). All of these activities are protected and concerted and formed the basis for Respondent's discipline of Marsland.

IV. NOTICE READING REMEDY

A remedy requiring a notice reading is appropriate in this case. In *DHSC, LLC*, 362 NLRB No. 28, slip op at *1 (2015), the Board found a notice reading appropriate because of "the serious and persistent nature of the Respondent's multiple unfair labor practices." Reading the notice aloud, whether by a high-ranking management official at the facility or by an Agent of the National Labor Relations Board, "serves as a minimal acknowledgement of the obligations that have been imposed by law and provides employees with some assurance that their rights under the Act will be respected in the future." *Id.* A public reading of the notice is an "effective but moderate way to let in a warming wind of information, and more important, reassurance." *In re*

Federated Logistics and Operations, 340 NLRB No. 36 (2003), citing ***J.P. Stevens & Co. v. NLRB***, 417 F.2d 533, 539-540 (5th Cir. 1969). The Respondent in *Federated Logistics and Operations*:

> violated Section 8(a)(1) by maintaining and enforcing an overly broad no-distribution/no-solicitation policy, interrogating employees, creating the impression of surveillance, soliciting employees to conduct surveillance, soliciting employee grievances, promising unspecified benefits, threatening employees that selecting the Union would be futile, threatening the loss of benefits, threatening that wages would be frozen or reduced, and threatening employees that the Union would strike and that the Respondent would react by moving its operation to another facility; and it violated Section 8(a)(3) by withholding a wage increase, suspending employees for engaging in protected activity, and by issuing discriminatory warnings.

In re Federated Logistics and Operations, 340 NLRB No. 36, 4. Further, the Respondent in that case made statements and enforced rules that pervaded the unit, made statements that had a long-term coercive impact on the unit, and many of the violations were committed by high-level management officials. *Id*.

This case is analogous to *DHSC, LLC* and *Federated Logistics and Operations*. In *DHSC, LLC* an employer unlawfully and discriminatorily warned and discharged a nurse employee and made unlawful statements to employees. In *Federated Logistics and Operations*, the employer committed many of the same violations during an organizing campaign as Respondent did here including disciplines, threats, and unlawful rules. In both cases, among other remedies, the Board required the employer to read the Board's notice to unit employees during their paid work time, in the presence of a Board agent, at a time and date selected by the union. Alternatively, the employer could opt to have the notice read by the Board agent in the presence of a responsible official of the employer.

In this case, Respondent's myriad unfair labor practices include suspension, discipline, and demotion of a prominent union supporter during the critical period of a union organizing campaign; unlawful statements sent to every nurse employee, threats, and surveillance of employees; forcing employees to make observable choices about their union support. These unfair labor practices pervaded the unit and were almost always committed by high-level management officials. The threats, rules, and requests for surveillance have a long-term impact on the unit. The unfair labor practices here, like those in *DHSC, LLC* and *Federated Logistics and Operations*, necessitate a notice reading.

V. CONCLUSION

Therefore, the General Counsel respectfully submits that, for all the reasons set forth above, Respondent violated Section 8(a)(1) and (3) of the Act by maintaining unlawful rules; making several unlawful statements about the union campaign; interrogating and threatening employees about union activity; maintaining a policy prohibiting employees from discussing their wages; maintaining a confidentiality policy that discourages employees from discussing the subject of disciplinary meetings; suspending, demoting, disciplining, and issuing an unfavorable performance appraisal to Marshall; and disciplining Marsland. The General Counsel respectfully requests that the ALJ issue a decision and recommended order granting the relief sought herein.

VI. PROPOSED CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and has been a health care institution within the meaning of Section 2(14) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the Act by engaging in the following conduct:

    a. Interrogating employees about their union sympathies and activities;

    b. Asking employees to report on colleagues activities on behalf of a union;

    c. Threatening employees with unspecified reprisals, including unemployment, for choosing to be represented by or supporting a union;

    d. Telling employees they were not permitted to distribute union literature;

    e. Telling employees they should not discuss their wages;

    f. Telling employees they should not discuss the contents of disciplinary meetings;

    g. Maintaining six overly broad and unlawful work rules in the Nursing Code of Conduct;

    h. Removing union material from break rooms;

    i. Removing union material from bulletin boards;

    j. Disciplining an employee for engaging in protected concerted activity by complaining about break issues and other terms and conditions of employment;

    k.

4. Respondent violated Section 8(a)(1) and (3) of the Act by suspending, demoting, and issuing an unfavorable performance evaluation to Anne Marshall because she engaged in union activities.
5.

6. Respondent's unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

VII. PROPOSED ORDER

7. Cease and desist from:
    a. Suspending, disciplining, demoting, or issuing unfavorable performance evaluations to employees because they engaged in union activities;

    b. Suspending, disciplining, demoting, or issuing unfavorable performance evaluations to employees because they engaged in protected concerted activities;

    c. Suspending, disciplining, demoting, or issuing unfavorable performance evaluations to employees based on unlawful rules;

    d. Telling employees to keep the contents of disciplinary meetings confidential;

    e. Telling employees it is inappropriate to discuss their wages;

    f. Interrogating employees about their union sympathies and activities;

    g. Threatening employees for supporting the union;

    h. Telling employees supporting the union will lead to unemployment;

    i. Telling employees they cannot set up a fixed table in the cafeteria to distribute union materials;

    j. Removing union materials from break rooms;

    k. Removing posted union materials from bulletin boards;

l. In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

8. Take the following affirmative action necessary to effectuate the policies of the Act:

a. Reinstate Anne Marshall to her former position with her seniority and all other rights and privileges, displacing if necessary, any worker hired to replace her, and if her position no longer exists, to another substantially equivalent position; remove from Respondent's files all references to the suspension, verbal warning, and demotion of Anne Marshall and notify her in writing that this has been done and that the discharge will not be used against her in any way;

b. Reinstate Anne Marshall's annual evaluation to that of her 2014 evaluation;

c. Make Anne Marshall whole for any loss of earnings and other benefits suffered as a result of the discrimination against her;

d. Remove from Respondent's files all references to the discipline of Scott Marsland, and inform him in writing that this has been done and that this discipline will not be used against him in any way;

e. At a meeting or meetings scheduled to ensure the widest possible audience, Respondent's representative Alan Pedersen shall read the notice to employees on work time in the presence of the Board agent or, alternatively, have a Board agent read the notice to employees during work time in the presence of Respondent's supervisors and agents as alleged in paragraph V of the Amended Consolidated Complaint;

f. Within 14 days after service by the Region, post at its facility in Ithaca, New York copies of the attached notice. Copies of the notice, on forms provided by

the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material;

g. Preserve and within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order;

h. Within 21 days after service by the Region, file with the Regional Director a sworn statement of a responsible official on a form provided by the Region attesting to the steps the Respondent has taken to comply.

VIII. PROPOSED NOTICE TO EMPLOYEES

FEDERAL LAW GIVES YOU THE RIGHT TO:

Form, join, or assist a union;

Choose a representative to bargain with us on your behalf;

Act together with other employees for your benefit and protection;

Choose not to engage in any of these protected activities.

WE WILL NOT do anything to prevent you from exercising the above rights.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the Act.

WE WILL NOT ask you to report on other employees' activities on behalf of 1199SEIU.

WE WILL NOT interrogate you about your support for a union.

WE WILL NOT threaten you with unspecified reprisals, including unemployment, if you choose to be represented by or support a union.

You may have union information and materials at work and **WE WILL NOT** stop you from doing so.

YOU HAVE THE RIGHT to discuss wages with other employees and **WE WILL NOT** do anything to interfere with your exercise of that right.

YOU HAVE THE RIGHT to discuss the content of your disciplinary meetings with other employees and **WE WILL NOT** tell you that you must keep the contents of those meetings confidential.

WE WILL NOT maintain the following overly broad rules in our Nursing Code of Conduct that infringes on your right to engage in union and/or protected concerted activity and **WE WILL** repeal the following rules:

Clinical Excellence

Respects confidentiality and privacy at all times, including co-workers, adhering to the Social Networking Policy.

Customer Service

Interacts with others in a considerate, patient and courteous manner.

Is honest, truthful, and respectful at all times.

People

Utilizes proper channels to express dissatisfaction with policies and administrative or supervisory actions and without fear of retaliation.

Community

Inappropriate and disruptive communications/behaviors include but are not limited to:

Displays behavior that would be considered by others to be intimidating, disrespectful or dismissive.

Criticizes co-workers or other staff in the presence of others in the workplace or in the presence of patients.

YOU HAVE THE RIGHT to freely bring break issues and other complaints about terms and conditions of employment to us on behalf of yourself and other employees and **WE WILL NOT** do anything to interfere with your exercise of that right.

WE WILL NOT discipline employees because they exercise their right to bring issues and complaints to us on behalf of themselves and other employees, or otherwise engage in protected concerted activity.

WE WILL NOT discipline, suspend, or demote you, or provide you an unfavorable performance evaluation because of your union membership or support.

WE WILL reinstate Anne Marshall to her charge nurse and team leader positions.

WE WILL pay employee Anne Marshall for the wages and other benefits she lost because we suspended, disciplined, demoted, and issued her an unfavorable performance evaluation.

WE WILL remove from our files all references to the suspension, discipline, demotion, and unfavorable performance evaluation of Anne Marshall and **WE WILL** notify her in writing that this has been done and that her suspension, verbal warning, and demotion will not be used against her in any way.

WE WILL remove from our files all references to the discipline of Scott Marsland and **WE**

WILL notify him in writing that this has been done and that his discipline will not be used against him in any way.

DATED at Buffalo, New York, this 12th day of July, 2016.

/s/ *Jessica L. Noto*

JESSICA L. NOTO
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